

**SUPPLEMENTAL PUBLIC APPENDIX**

**Oral Argument Not Yet Scheduled**

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**In the United States Court of Appeals  
for the District of Columbia Circuit**

**AUG 08 2008**

**Copyright Royalty Board**

**Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179**

**INTERCOLLEGIATE BROADCAST SYSTEM, *et al.*,  
Appellants,**

**v.**

**COPYRIGHT ROYALTY BOARD,  
Appellee,**

**SOUNDEXCHANGE, INC.,  
Intervenor,**

**NATIONAL ASSOCIATION OF BROADCASTERS,  
Intervenor.**

**ON APPEAL OF AN ORDER OF THE  
COPYRIGHT ROYALTY BOARD**

**JOINT APPENDIX VOLUME VII**

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Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.

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In the matter of: |

The Digital Performance |  
Right in Sound Recordings | Docket No.  
and Ephemeral Recordings | 2005-1 CRB DTRA  
(Webcasting Rate |  
Adjustment Proceeding) |

|-----+  
Volume 5

Room LM-414  
Library of Congress  
First and Independence Ave., S.E.  
Washington, D.C. 20540

Monday,  
May 8, 2006

The above-entitled matter came on for  
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge  
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge  
THE HONORABLE STAN WISNIEWSKI, Judge

1 substantial market power and substantial  
2 bargaining power?

3 A Well, I use bargaining power in a  
4 very specific sense, referring to how we  
5 divide up the surplus. In different contexts  
6 people use market power loosely and in  
7 different ways. I'm trying to be precise.

8 Q Now I can't hear.

9 A I use bargaining power in a very  
10 specific way regarding -- referring to the way  
11 that the surplus would be divided up between  
12 buyer and a seller. So it has a very  
13 specific, concrete use in this.

14 The word market power is sometimes  
15 used loosely and applied in lots of different  
16 situations.

17 Q As you understand the word market  
18 power, do you make a distinction between an  
19 entity and a negotiation can have substantial  
20 bargaining power and substantial market power?

21 A Well, as I say, I'm going to use  
22 the word bargaining power. I've defined that,

1 and market power sometimes refers to a  
2 monopolist or other types of situations that  
3 aren't the case here.

4 Q Well, you can have substantial  
5 market power and not be the single seller in  
6 a market, right?

7 A You could use the word that way.

8 Q You testified this morning on your  
9 direct testimony as a practical matter the  
10 labels in dealing with the webcasters as you  
11 see them under the statutory license control  
12 an indispensable input to their business,  
13 correct?

14 A Yes, that's correct.

15 Q And that gives the labels  
16 substantial bargaining power.

17 A That is correct, yeah.

18 Q Now, I believe your testimony, if  
19 not specifically here in your written  
20 testimony, was that webcasters in the market  
21 that you're looking at would have little  
22 choice but to get a license from all the Big

1 Four major record companies, correct?

2 A They would have choice, but little  
3 choice.

4 Q Now, you did not seek to create a  
5 model for a freely competitive market,  
6 correct?

7 A Well, I do believe these companies  
8 are competing with one another. Again, the  
9 word "competitive" is sometimes used loosely  
10 and sometimes refers to what economists call  
11 perfect competition where people have no  
12 bargaining power, no ability to affect prices  
13 whatsoever.

14 So if you are using the word in  
15 that sense, no, I would not consider this a  
16 market where the players have zero bargaining  
17 power.

18 Q And you did not seek to replicate  
19 such a hypothetical competitive market here,  
20 did you?

21 A Again, the word "competitive," are  
22 you referring to perfectly competitive with no

1 bargaining power or are you --

2 Q Yes.

3 A -- referring --

4 Q Let's take your definition of a  
5 perfectly competitive market. You didn't seek  
6 to replicate a perfectly competitive market  
7 here.

8 A There are many definitions of  
9 competition. There's monopolistic  
10 competition. There's perfect competition.

11 Q One of which, let's take your  
12 definition, one in which there is no  
13 bargaining leverage whatsoever as between the  
14 participants and the market.

15 A What about that?

16 Q You did not seek to replicate a  
17 market in which the buyers and the sellers had  
18 equal bargaining power, correct?

19 A Well, my model can easily adapt  
20 any level of bargaining power. As you may  
21 recall, there's a parameter in there. You  
22 could set it to 50 percent if you'd like.

1 That would represent the case where they had  
2 equal bargaining power. So the model would be  
3 unaffected by that choice.

4 Q Well, we'll come back to that in a  
5 moment, but the fact is that when you  
6 undertook your analysis, you assumed a market  
7 in which the labels had substantial bargaining  
8 power and the webcasters have little  
9 bargaining power, correct?

10 A No, I don't think you entirely  
11 understood the analysis. What we did was we  
12 analyzed the surplus that was available, and  
13 that would be available regardless of the  
14 bargaining power. So most of the analysis  
15 really doesn't depend at all on the bargaining  
16 power at all. The same analysis would carry  
17 through the same numbers and so forth.

18 There's a parameter in there for  
19 bargaining power. My judgment is that the  
20 record labels have substantially more  
21 bargaining power than the webcasters. So when  
22 we enter that in, you would see how that

1 surplus was divided. That didn't affect the  
2 rest of the model.

3 If you for some reason thought  
4 that the webcasters had as much bargaining  
5 power as the labels, you could use the exact  
6 same model. You could plug it in. In fact,  
7 we did that exact exercise right here this  
8 morning where we examined what would be the  
9 case if they had equal bargaining power.

10 And as you may recall, that led to  
11 a small adjustment in the surplus division.  
12 I actually stated for the record what the  
13 amounts of the surplus would be going to each  
14 party. So that was the model that we just  
15 presented.

16 Q So what you're saying is that  
17 essentially you take the model you created and  
18 just adjust for equal bargaining power by  
19 changing the 75 to 50, right?

20 A That's it. That's exactly it.

21 Q Okay. But when you were preparing  
22 your model, you rejected the concept of

1 modeling based on a competitive market in  
2 which there were multiple sellers and multiple  
3 buyers with equal bargaining power, correct?

4 A No. Again, we have multiple  
5 sellers. I described the sellers. We have  
6 multiple buyers. the models carries so you  
7 can have equal bargaining power if you want  
8 to. That's exactly the model that we just  
9 went through. I don't want to do it again.

10 Q Well, we're going to go through it  
11 again in painful detail, I'm afraid. Now, the  
12 fact is that the 75 percent surplus figure  
13 that you arrived at was essentially the  
14 midpoint between a market in which the labels  
15 would have all of the bargaining power and get  
16 100 percent of the surplus and a market in  
17 which entities had equal bargaining power,  
18 right?

19 A Seventy-five percent is the  
20 midpoint between 100 percent and 50 percent.

21 Q And that's basically how you got  
22 to the number, right? You just took the

1 midpoint?

2 A No. I considered the bargaining  
3 power that each of the parties had, and we  
4 discussed this a little bit. I'd be happy to  
5 recapitulate. The way we got to that number  
6 was that we considered that the labels own an  
7 indispensable asset, as you pointed out  
8 earlier. They owned the copyrights. It's  
9 illegal for the webcasters to broadcast that  
10 music without the label's permission. They  
11 have multiple channels that they can offer  
12 that music in, and this asset is greatly  
13 valued by consumers. People are willing to  
14 pay a lot for it.

15 Conversely, the webcasters are an  
16 industry with relatively low barriers to  
17 entry. That means that there's nothing that  
18 prevents somebody from coming in and setting  
19 up shop. You can buy webcasting services.  
20 You can actually outsource them. You don't  
21 even have to buy your own equipment if you  
22 want to. Companies like Live365 will help set

1 that.

2 Would you agree with the  
3 proposition that webcasters operating under  
4 the statutory license are very different than  
5 services engaged in on demand streaming and  
6 limited download delivery in terms of the  
7 bargaining power they have relative to the  
8 four majors?

9 A Are they very different? There  
10 are some differences and there are some  
11 similarities.

12 Q Did you in arriving at your 75  
13 percent figure make any adjustment for the  
14 different bargaining power between services  
15 operating under the statutory license and  
16 services providing on demand services?

17 A I'm not really sure I understand  
18 what your question is when you say did I make  
19 --

20 Q Well, let me try it again this  
21 way. You arrived at your 75 percent figure on  
22 the basis of assessing a market in which you

1 Q Take a look at the bottom of page  
2 74, starting on Line 22, where I asked Mr.  
3 Kenswil the following question: "Let me go  
4 back to ask you this question with respect to  
5 non-on demand Internet radio services. Is it  
6 your view that non-on demand Internet radio  
7 services have to have a license from all the  
8 major labels in order to offer a desirable  
9 product?"

10 Answer: "No."

11 Question: "Why is that?"

12 Answer: "Because radio doesn't  
13 play everything, and you could program very  
14 good radio stations from a much smaller supply  
15 of music than the entire universe of music and  
16 have a very satisfying programming service."

17 Did you consider the testimony of  
18 Mr. Kenswil of Universal Music Group in  
19 connection with arriving at the conclusions  
20 that you arrived at with respect to the  
21 indispensable nature of each of the four major  
22 labels' catalogues to a entity operating under

1 believe the entities operating under the  
2 statutory license had very little choice but  
3 to get a liense from all four of the majors,  
4 as you said, because they had an input that  
5 was indispensable to their product, correct?

6 A That was part of my reasoning,  
7 yes. That was definitely a factor.

8 Q Now, did you consider in giving  
9 that testimony the different testimony that  
10 was given during the depositions by Mr.  
11 Kenswil for Universal Music Group?

12 A You'll have to refresh my memory  
13 on that.

14 MR. STEINTHAL: We will have  
15 marked as Services Exhibit 22 an excerpt from  
16 the deposition of Lawrence Kenswil of  
17 Universal Music Group.

18 (Whereupon, the document  
19 referred to was marked as  
20 Services Exhibit No. 22 for  
21 identification.)

22 BY MR. STEINTHAL:

1 the statutory license?

2 A I certainly considered this back -  
3 -I may well have read this. I read a large  
4 number of documents. I don't think it's  
5 inconsistent with my conclusion.

6 Q You don't think this is  
7 inconsistent with the conclusion you reached  
8 that you testified to earlier today that you  
9 viewed a webcaster operating under the  
10 statutory license to have an indispensable  
11 need to access the catalogues of the four  
12 major record companies in order to operate a  
13 successful digital music service?

14 MR. SMITH: Objection.

15 Mischaracterizes the testimony earlier.

16 CHIEF JUDGE SLEDGE: In what way?

17 MR. SMITH: By saying that he said  
18 it was indispensable for anybody operating  
19 under the statutory license. That is not what  
20 he said. The testimony would address  
21 webcasters, and it did not use the word  
22 "indispensable."

1 Q So you're proposing, just so it's  
2 clear that the labels get the up side, the  
3 percentage in the revenues, without the down  
4 side if the webcasters end up going in the  
5 tank, right?

6 A No, that's not correct.

7 Q Well, in what respect do the  
8 labels share in the losses that webcasters may  
9 incur if this rate is set too high?

10 A Well, as I mentioned, part of my  
11 proposal is that there be revenue sharing, and  
12 that means that if the revenues end up being  
13 less than projected, the labels would earn  
14 less than we projected. If it ended up being  
15 more, they would earn more.

16 So they share partially, but they  
17 don't -- they're not -- they don't share  
18 completely. I don't think they insure and  
19 insulate the webcasters, no.

20 Q What you're talking about is  
21 sharing in less revenue, not sharing in  
22 losses, right, to be clear?

1 there are potential revenues that they could  
2 earn there. So if they wanted to earn those  
3 revenues, they would want to license to them,  
4 but there are other channels that they could  
5 sell their music.

6 Q And, indeed, the amount of money  
7 that they look at this market representing is  
8 so small that you concluded, as you say on  
9 page 6 of your written testimony, "Record  
10 companies, on the other hand, do not have the  
11 same need to sell to all or even any  
12 webcasters in order to be successful." You  
13 said that in your written testimony, right?

14 A Yes, and just to be fair, they  
15 don't have the same need as the webcasters I  
16 think is what it's referring to.

17 Q And one of the reasons is because  
18 the amount of money that this market  
19 represents to the labels is less than one  
20 tenth of one percent of their total revenues,  
21 right? So it's just not that big a deal.

22 A It gives them a lot of bargaining

1 A The labels have a set of risks  
2 that I've enumerated which may be costly to  
3 them. The webcasters have a set of risks, and  
4 in the revenues they would share in those.  
5 Certainly there are places where the revenues  
6 -- where the labels risk losses, for instance,  
7 in other music channels.

8 Q You acknowledge, do you not, that  
9 many webcasters have sunk a substantial amount  
10 of money in the technology and in investing in  
11 the webcasting business?

12 A Yes, they have.

13 Q And I think you acknowledged today  
14 and in your written testimony that the labels  
15 don't -- strike that -- the labels are not in  
16 a position where they have any -- strike that.  
17 I have to reformulate this. I'm sorry.

18 You acknowledge, do you not, that  
19 the recording companies don't have any need to  
20 license the webcasters in order to be  
21 successful?

22 A They don't have any need? Well,

1 power to capture a bigger share of the  
2 revenue.

3 Q And you've acknowledged in your  
4 testimony, in particular at your deposition,  
5 have you not, that the labels' marginal cost  
6 of distribution via webcasting is zero or near  
7 zero, correct?

8 A The first marginal costs are close  
9 to zero. Probably the most important cost  
10 would be losses of revenue from other  
11 channels, the extent to which people  
12 substituted listening to Internet radio for  
13 other revenue streams.

14 Q So to the extent that we're  
15 demonstrating that there was some  
16 substitutional loss, that would be their cost,  
17 but other than that their marginal cost is  
18 zero, correct?

19 A Yes, that's correct.

20 Q Now, you gave the example of a pen  
21 earlier today. Do you remember that?

22 A This one right here.



1 spillover that goes the other way?  
 2 A I'm sorry. ASCAP or AOL?  
 3 Q I don't think I said ASCAP.  
 4 PARTICIPANT: You did actually.  
 5 MR. STEINTHAL: Wow, sorry. We'll  
 6 get there.  
 7 BY MR. STEINTHAL:  
 8 Q Do you have any evidence that the  
 9 spillover that benefits the music portions of  
 10 the portal at AOL or Yahoo by virtue of people  
 11 that go to non-music aspects of the portal are  
 12 any greater or lesser than the spillover  
 13 benefits that go the other way, people going  
 14 to music and then after going to music convey  
 15 some benefit to the other aspects of Yahoo or  
 16 AOL?  
 17 A Well, let me just reiterate so  
 18 that there's no misunderstanding. This is not  
 19 part of my economic analysis in terms of the  
 20 rate that I came up with, but since you asked  
 21 the question, let me clarify. It's quite  
 22 possible that Yahoo as a whole gets -- the

1 flow of the spillover is one direction or the  
 2 other. They don't cancel each other out. You  
 3 can have it, and indeed, the business model's  
 4 premised on the idea that you've got synergies  
 5 if you complementary these; that a set of  
 6 properties that leverage each other is more  
 7 valuable than those properties in isolation or  
 8 stand alone.  
 9 So it's a misunderstanding of the  
 10 economics to try to somehow equate spillovers  
 11 in one direction or the other or weigh them  
 12 one against the other. What matters is how  
 13 much value Yahoo music creates for Yahoo as a  
 14 whole overall. How would Yahoo -- how much  
 15 value would they have if for some reason they  
 16 couldn't offer Yahoo music? If they were in  
 17 a bargaining situation with the owners of the  
 18 copyrighted music, they would have to bargain  
 19 over that value, and the value that would be  
 20 at risk for Yahoo would be the synergies, the  
 21 additional value to be created overall for  
 22 Yahoo as an enterprise, and that would an

1 amount of surplus that they would take into  
 2 consideration, a rational business person  
 3 would take into consideration when they  
 4 decided whether or not to do the deal.  
 5 This issue about measuring the  
 6 flows, you know, one way versus the other not  
 7 only wasn't in my model, but it's not even --  
 8 even the words to include spillovers wouldn't  
 9 be the way one would go about analyzing it.  
 10 Q I promise you if you hadn't  
 11 testified about the spillover this morning to  
 12 the benefit of the music part of these  
 13 websites, I would not have asked you these  
 14 questions. Okay?  
 15 You're familiar with the fact that  
 16 there are times when a portal has an aspect of  
 17 their website that they shut down?  
 18 A Yes, I am.  
 19 Q So presumably the sum of all the  
 20 parts, including the parts that they shut down  
 21 occasionally is not greater than the  
 22 individual components added up.

1 A A lot of companies fell by the  
 2 wayside realizing that you couldn't just  
 3 willy-nilly list a bunch of services and  
 4 assume that that amounted to a viable business  
 5 model.  
 6 Q Now, Professor, your model is  
 7 premised, is it not, on calculating the  
 8 surplus as you call it and splitting it up  
 9 between the sound recording copyright owners  
 10 and the webcasters based on their relative  
 11 bargaining power? That's a neutral enough  
 12 statement, right?  
 13 A Yes, that's a correct  
 14 characterization.  
 15 Q Okay. And you reached your  
 16 conclusions based on estimating the  
 17 webcasters' costs and revenues, correct?  
 18 A Yes, that's correct.  
 19 Q And because the licenses to the  
 20 sound recordings are as a whole anyway  
 21 indispensable. That's where you used the word  
 22 "indispensable."

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.

|-----+  
In the matter of:

The Digital Performance Right	Docket No.
in Sound Recordings and	2005-1
Ephemeral Recordings	CRB DTRA

(Webcasting Rate Adjustment  
Proceeding)

|-----+  
Volume 28

Room LM-414  
Library of Congress  
First & Independence Aves, S.E.  
Washington, D.C. 20540  
Wednesday,  
July 26, 2006

The above-entitled matter came on  
for hearing, pursuant to notice, at 9:30  
a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge  
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge  
THE HONORABLE STAN WISNIEWSKI, Judge

1 it's experimental, but we'll see where it  
2 goes. He said but it's going to be three or  
3 four months before the software is ready. And  
4 about six weeks later, he showed up and said  
5 okay, here's the software. It's ready to go.  
6 And KLIF, which was a news and talk station  
7 that we owned, was the first station that we  
8 put on there.

9 There were a handful of other  
10 stations that were streaming at the time,  
11 usually at colleges, very experimental. We  
12 believe it was the first commercial radio  
13 station to actually be streamed on the  
14 Internet.

15 So he started a small company  
16 called AudioNet. Later on that company,  
17 AudioNet became Broadcast.com. They went from  
18 our AM station in Dallas to adding an FM  
19 station as technology allowed. Later, in the  
20 late 1990s we signed a group deal so that all  
21 of the Susquehanna stations were on  
22 Broadcast.com.

1 When that first started, there  
2 were no performance royalties at all. Later,  
3 when that became a -- a factor, the -- the  
4 business arrangement we had is that  
5 Broadcast.com would pay all of the royalty  
6 fees for the radio station. Mark built a nice  
7 business not only in that. He had several  
8 hundred radio stations. He had other  
9 streaming products that he offered. And then  
10 he sold that -- sold that company,  
11 Broadcast.com to Yahoo! for I think \$5.3  
12 billion -- billion.

13 Q Did there come a time that your  
14 relationship with Yahoo! came to an end?

15 A Yes, we were with them kind of  
16 from the point where it was Broadcast.com into  
17 Yahoo!. What we did was we gave them over-  
18 the-air advertising in exchange for the  
19 services of the bandwidth and any other  
20 expenses that they had. And my recollection  
21 was that shortly after the decision to, you  
22 know, kind of have performance royalty fees,

1 Yahoo! got out of the broadcast business, the  
2 -- of -- of simulcasting local radio stations  
3 over their system.

4 The -- the CFO of the company at  
5 the time called me up and said it was not a --  
6 a profitable venture for them. They couldn't  
7 make a go of it and they were getting out of  
8 that -- that line of work.

9 Q Now can you tell the Court what a  
10 listener to a simulcast stream; try not to  
11 belabor the obvious here, but what a listener  
12 to a simulcast stream hears and how it relates  
13 to the over-the-air broadcast when the  
14 listener listens to the simulcast stream?

15 Q Yes, when -- when a listener  
16 listens to our broadcast that would be our  
17 terrestrial broadcast that's now simulcast on  
18 an Internet stream, they're really listening  
19 to the exact same product that they hear on  
20 the air with just one exception. And one of  
21 the many challenges that broadcasters have  
22 faced over the years with streaming is that

1 sometime in the -- and I'm -- I'm trying to  
2 remember the right timing of it, it seems like  
3 it was right around 2001, right in there,  
4 because it was about the same time that kind  
5 of the performance royalty issue became an  
6 issue for broadcasters because it hadn't been  
7 around before. Then the advertising agency  
8 organization called the Four As, it's an  
9 organization that represents ad agencies,  
10 offered a letter and an opinion that -- that  
11 ad agencies did not have the right to run  
12 certain commercials over the Internet, that  
13 their AFTRA voice-over artists had -- had  
14 signed up and had a contract so they could  
15 just be heard when they were operating in the  
16 local market. But because the Internet took  
17 that product worldwide, it was possible that  
18 those voice-over talents might be -- they --  
19 that the agencies might be liable to pay an  
20 additional payment to those -- to those voice-  
21 over artists.

22 So at that time, based on the

1 letters that were circulated by the Four As,  
2 most -- really all radio stations started  
3 taking the local ads out of that stream using  
4 a variety of different methods so that they  
5 would not have any liability in -- in that  
6 regard. So it was kind of another problem we  
7 faced in this whole area.

8       So now, today, if you hear the --  
9 the -- our local radio stations simulcast over  
10 the stream, you're hearing exactly our product  
11 with the exception that the ads are extracted  
12 or covered, or in some way do not appear on  
13 that stream.

14       Q   Now, Mr. Halyburton, you have used  
15 the term our "product" a few times. When you  
16 as a radio person speak of your "product,"  
17 what are you referring to?

18       A   Well, you know, a radio station is  
19 really the -- the sum of all its parts. You  
20 know, I think the thing we always say about  
21 radio, it's not -- it's really what happens  
22 between the records. You know, because a

1 There's a guy -- there's a guy that works for  
2 me in New York City on Hot 97. His name is  
3 Funk Master Flex. Make sure you get that  
4 right on the records. We just call him Flex  
5 for short. He's probably the most listened to  
6 disc jockey in America in the 8:00 to midnight  
7 slot. You know, millions of people listen for  
8 him every week. And, you know, if he talks  
9 about products or talks about things that are  
10 going on in the greater New York area, people  
11 pay a lot of attention. So, just kind of an  
12 illustration to let you know that radio  
13 stations are -- are kind of the sum of their  
14 parts.

15       If I'm -- if I'm a radio seller,  
16 if I'm a sales person and I come into you and  
17 you're an advertiser and I want to talk to you  
18 about my radio station, we'll probably spend  
19 about 10 seconds talking about what kind of  
20 music we play. And then the rest of the time  
21 in -- in my effort to kind of convince you  
22 that we might be the right place for your

1 radio station certainly plays music; we're  
2 talking about music radio stations, but it's  
3 really a lot more elements to the radio  
4 station. There is, you know, probably --  
5 primarily the thing that we mostly think about  
6 is -- is the morning show. You know, if you  
7 have a popular morning show, it frankly can  
8 drive your ratings, you know, very  
9 substantially and -- and really have benefits  
10 throughout the day. A lot of cases morning  
11 shows don't play much music at all because of  
12 the personality aspect of the morning show.

13       You know, there are other parts of  
14 the radio station. There are -- a -- a lot of  
15 effort goes into trying to create a bond  
16 between the listener and the radio station and  
17 it's generally that we find that it's these  
18 other elements that help us do that. So it's  
19 contesting, it's loyal listener clubs, it's  
20 news service, community affairs. The disc  
21 jockeys themselves have a very loyal following  
22 in a lot of cases with -- with their audience.

1 advertising, I'm going to talk about all the  
2 other elements of my radio station.

3       And the reason that is, is  
4 because, you know, the -- there -- there's  
5 usually another radio station, especially in  
6 major markets, right across the street in your  
7 same city that fundamentally is playing the  
8 same songs that you play, yet with -- if you  
9 put the radio stations together in such a way,  
10 your ratings, even though you play the same  
11 music as the other guy, could be a whole lot  
12 higher than -- than the other.

13       In Dallas, if I'm going to be in  
14 and I'm going to talk about KPLX, the  
15 Susquehanna station called The Wolf, it has a  
16 very Texas kind of flavor. It has a lot of,  
17 you know, local kind of Texana feel to it, I'm  
18 going to be talking to you about all the  
19 different parts of that radio station.

20       If you're the competitor, KSCS,  
21 you're going to talk about Terry Dorsey, the  
22 25 -- long time 25-year morning show disc

1 because it -- because it was an expensive  
2 proposition.

3 Q But it did happen sometimes?

4 A Oh, yes, I'm sure it happened.

5 Q As part of selling a larger  
6 package?

7 A I don't think it was a regular  
8 thing, but it could have happened.

9 Q Okay. And I'm sorry, I don't  
10 think have too much longer --

11 A Okay.

12 Q -- but the time we have remaining,  
13 we need not to talk over each other. Okay?

14 A Okay. Sure.

15 Q Let me just go back to where I  
16 think we were, which is it did happen to your  
17 knowledge that sometimes in-stream ads would  
18 be supplied for free as part of a package to  
19 sell terrestrial advertising, right?

20 A It's possible.

21 Q And sometimes in-stream ads might  
22 have been provided at a discount in order to

1 advertising on the Internet, stations must  
2 fill this gap of time on the Internet stream.

3 So I guess I'm not following --

4 THE WITNESS: Well, we would fill  
5 that with PSAs. We would fill it with station  
6 promotional announcements. And so if you were  
7 to listen to a stream today on -- on one of  
8 these stations, I think you would hear a mix.  
9 You'd hear some commercials that were -- were  
10 ad insertion commercials. You'd hear some  
11 promos, you -- you would hear -- you might  
12 hear a feature that the station created to  
13 fill that slot.

14 JUDGE ROBERTS: But if I'm hearing  
15 you correctly, I might also hear the same ad  
16 that I would be hearing over the terrestrial  
17 broadcast.

18 THE WITNESS: No, we would -- if  
19 the system's working right, you shouldn't hear  
20 one of those terrestrial ads on that stream.  
21 It would be blocked out. The system looks at  
22 it and says these are commercials. When they

1 sell terrestrial advertising, right?

2 A Not likely, but possible.

3 Q Okay.

4 JUDGE ROBERTS: Mr. Handzo, I have  
5 one question.

6 Is this activity that you're  
7 speaking about all before 2001? You mentioned  
8 what you've described as the AFTRA prohibition  
9 on using or retransmitting over-the-air ads  
10 over the stream. So are we talking about, you  
11 know, whether the ad is given away on the  
12 stream or is part of the package of selling it  
13 for the terrestrial? Is this all activity  
14 before 2001 and this AFTRA prohibition?

15 THE WITNESS: No, that -- that  
16 would be current -- current -- the kind of  
17 questions you're asking would relate to  
18 current business practices.

19 JUDGE ROBERTS: I guess then I'm  
20 unclear; and I'm looking at page 7 of your  
21 testimony, paragraph 17, where you say the  
22 prohibition on simulcasting terrestrial radio

1 come along, based on that code, block them out  
2 and put something else in its place.

3 JUDGE ROBERTS: Then I guess I'm  
4 unclear then as to what the discussion is here  
5 about the ads being sold terrestrially, but at  
6 the same time also being part of the  
7 streaming.

8 And maybe, Mr. Handzo, you can  
9 help clarify this conundrum.

10 BY MR. HANDZO:

11 Q Well, let me ask a question. If  
12 you sold a package that included both  
13 terrestrial advertising and an ad in the  
14 Internet stream, would the ad in the Internet  
15 stream just be a different ad than the over-  
16 the-air?

17 A Yes, let's say -- let's use  
18 McDonald's as an example. They buy an on-air  
19 ad and now they want to run an ad on the  
20 Internet stream. It's some part of the  
21 business transaction that's going to take  
22 place. They could do a couple things. One,

1 they might have a non-AFTRA voice voice the  
2 ad; unlikely, because they're signatory to  
3 AFTRA, so they probably don't want to do that.  
4 So probably what they'd ask us to do is to  
5 take one of our voice-over people in the radio  
6 station and redo and ad or do a special ad.

7 As a practical matter, McDonald's  
8 isn't a very good use -- example of that.  
9 McDonald's has not been a customer on that.  
10 Usually those customers that we're talking  
11 about are the -- for the Internet stream are  
12 smaller advertisers that were sold for  
13 Internet only; very small number of people,  
14 but as we've seen here, but does that help  
15 answer the question?

16 JUDGE ROGERS: Somewhat. I'm  
17 still wondering however when there can be  
18 circumstances where that over-the-air ad is  
19 actually still nevertheless on the stream. I  
20 hear you saying that it's virtually never, but  
21 some of your testimony seems to suggest that  
22 it does occur.

1 THE WITNESS: Only -- it should  
2 not occur that an over-the-air terrestrial ad  
3 would appear on the Internet stream because we  
4 don't know -- we have no technology or  
5 mechanism to know whether those ads have been  
6 approved for, you know, playback on the  
7 Internet. So, as a practical course, we block  
8 all of the terrestrial commercials. They  
9 never got onto the stream and then now it's  
10 our job to find other things to put in its  
11 place. It might be a local commercial, it  
12 might be a PSA, it might be a promo, but it --  
13 it wouldn't be a terrestrial ad, unless for  
14 some reason they came along -- I'm not very  
15 familiar, I don't know of any of these that  
16 came along and said hey, here's our ad that  
17 runs on -- on -- on the air and it's cleared  
18 for Internet use. It just -- it isn't  
19 happening. They -- they don't want to spend  
20 the money to -- to do that. And -- and as a  
21 practical matter, those aren't our customers  
22 for the stream, the little bit of stream

1 advertising we do sell, it's more like local  
2 businesses that are right in the local area.

3 JUDGE ROBERTS: Perhaps I'm not --

4 THE WITNESS: One of our disc  
5 jockey's invoices that --

6 JUDGE ROBERTS: Perhaps I'm not  
7 clear, but I thought you said earlier in your  
8 direct testimony that Mr. Lee who was  
9 resisting running streaming ads of radio  
10 stations but has now succumbed to that  
11 temptation is actually doing that.

12 THE WITNESS: He's just covering  
13 all the ads.

14 JUDGE ROBERTS: He's covering all  
15 the ads.

16 THE WITNESS: He just covers them  
17 up with promos, PSAs.

18 JUDGE ROBERTS: Oh, that's what  
19 you mean by covering? I thought by cover you  
20 were meaning he was replicated --

21 THE WITNESS: No, he's -- he's  
22 just covering them up.

1 JUDGE ROBERTS: I see.

2 THE WITNESS: He might have an  
3 advertiser that would buy both --

4 JUDGE ROBERTS: I understand.

5 THE WITNESS: But for the most  
6 part, he's just -- when you go there, you  
7 hear, you know, something else.

8 JUDGE ROBERTS: Okay. I  
9 misunderstood the use of the term cover.

10 THE WITNESS: Sorry.

11 JUDGE ROBERTS: Okay. Thank you.

12 BY MR. HANDZO:

13 Q Mr. Halyburton, you talked a  
14 little bit in your direct testimony about the  
15 musical works fees that have been negotiated  
16 with ASCAP and BMI. Do you recall that?

17 A Yes.

18 Q Okay. I want to ask you a couple  
19 of questions about the BMI agreement. That  
20 was an agreement negotiated between BMI and  
21 the Radio Music License Committee, is that  
22 right?

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.

-----+  
In the Matter of:

The Digital Performance Right  
in Sound Recordings and  
Ephemeral Recordings

(Webcasting Rate Adjustment  
Proceeding)

Docket No.  
2005-1 CRB DTRA

-----+  
Volume 31

Room LM-414  
Library of Congress  
First and Independence  
Avenue, S.E.  
Washington, D.C. 20540

Tuesday,  
August 1, 2006

The above-entitled matter came on  
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge  
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge  
THE HONORABLE STAN WISNIEWSKI, Judge

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## I-N-D-E-X

WITNESS	EXAMINATION
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EXHIBIT	MARKED	RECEIVED
Services		
Number 165A	6	6
SoundExchange		
Number SX-113	211	220
Number SX-114	233	*
Number SX-115	254	*
Number SX-116	266	
Number SX-174	299	304

\*Received in evidence in closed session.



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1 P-R-O-C-E-E-D-I-N-G-S  
 2 (9:35 a.m.)  
 3 CHIEF JUDGE SLEDGE: One thing we  
 4 might do before we start with the witness this  
 5 morning is we have a motion by DiMA to admit  
 6 amended exhibit 165 with the representation  
 7 that it is unopposed by SoundExchange and  
 8 Radio Broadcasters.  
 9 Any comment on that motion?  
 10 MR. PERRELLI: No, Your Honor.  
 11 CHIEF JUDGE SLEDGE: Without  
 12 objection, that motion is granted.  
 13 THE REPORTER: 165A?  
 14 CHIEF JUDGE SLEDGE: That's a good  
 15 question. They present in their motion that  
 16 the correction is identified as 165, which is  
 17 a problem. See, we already have 165. So I  
 18 guess, actually, that's a good idea, John.  
 19 That's granted with the corrected version  
 20 being labeled as 165A.  
 21 (Whereupon, the  
 22 aforementioned document,

Page 7

1 was marked for  
 2 identification as  
 3 Services Exhibit Number  
 4 165A, as amended, and  
 5 was received in  
 6 evidence.)  
 7 CHIEF JUDGE SLEDGE: And, David,  
 8 if you would make that change on what has been  
 9 filed?  
 10 Ms. Ablin?  
 11 MS. ABLIN: Your Honor, before we  
 12 get started, I did just want to introduce a  
 13 new face in the room. And that is Mr. Harve  
 14 Hendrickson sitting in the second row on the  
 15 left-hand side. He is the Chair of the  
 16 National Religious Broadcasters Noncommercial  
 17 Music License Committee. He's come out here  
 18 from Minnesota to participate.  
 19 CHIEF JUDGE SLEDGE: Speak up.  
 20 MS. ABLIN: He's traveled out here  
 21 from Minnesota to participate and to observe  
 22 today's hearing.

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1 CHIEF JUDGE SLEDGE: Welcome.  
 2 MS. ABLIN: And at this point the  
 3 National Religious Broadcasters Noncommercial  
 4 Music License Committee calls Eric Johnson.  
 5 CHIEF JUDGE SLEDGE: Thank you.  
 6 Mr. Johnson, please raise your  
 7 right hand.  
 8 Whereupon,  
 9 ERIC JOHNSON  
 10 was called as a witness by counsel for the  
 11 National Religious Broadcasters Noncommercial  
 12 Music License Committee and, having been first  
 13 duly sworn, was examined and testified as  
 14 follows:  
 15 CHIEF JUDGE SLEDGE: Thank you.  
 16 Please be seated.  
 17 MS. ABLIN: And also before we  
 18 start, Mr. Astle is going to be handing out  
 19 the witness notebooks to cover Mr. Johnson's  
 20 testimony and include his exhibits.  
 21 MS. ABLIN: Good morning, Mr.  
 22 Johnson.

Page 9

1 DIRECT EXAMINATION  
 2 BY MS. ABLIN:  
 3 Q Could you please state your name?  
 4 A My name is Eric Johnson, Eric with  
 5 a c.  
 6 Q And where are you employed?  
 7 A I'm employed at Cedarville  
 8 University, CDR Radio Network within the  
 9 university.  
 10 Q What is your job title?  
 11 A I'm Assistant Manager and Music  
 12 Director for the radio station.  
 13 Q And, just to simplify matters, may  
 14 I refer to the CDR Radio Network simply as  
 15 CDR?  
 16 A Absolutely.  
 17 Q Now, before we get to CDR, could  
 18 you just give us a brief background on  
 19 Cedarville University?  
 20 A Cedarville University started in  
 21 1887, over 100 years ago, as a Presbyterian  
 22 university. About 50 years ago, a little over

1 working for the AM station, plus working at  
2 CDR radio. So that would be 18 years.

3 Q Now, on whose behalf are you  
4 testifying today?

5 A The National Religious  
6 Broadcasters Noncommercial Music License  
7 Committee.

8 Q And, just for the sake of  
9 shortening matters here, will it be acceptable  
10 to refer to the committee as the NRBNMLC, or  
11 simply the committee?

12 A Yes.

13 Q Now, who is the NRBNMLC?

14 A The NRB, National Religious  
15 Broadcasters, for years has had a committee  
16 that deals with licensing matters, National  
17 Religious Broadcasters Licensing. It's a  
18 licensing committee.

19 The noncommercial side of things  
20 started about three years ago to help  
21 noncommercial stations. There wasn't any  
22 representation for noncommercial stations

1 outside of what was previously there. And we  
2 thought it was important about three years ago  
3 to start a noncommercial committee. And so  
4 that started about three years ago to help us  
5 in licensing matters.

6 Q And who does the NRBNMLC  
7 represent?

8 A It represents religious stations,  
9 noncommercial religious stations.

10 Q Are some of those stations  
11 affiliated with colleges and universities?

12 A Yes. Our station is one of those,  
13 but it's not just colleges. It's also -- it's  
14 colleges, universities, and also any other  
15 religious, noncommercial religious, station.

16 Q And what is the mission of the  
17 NRBNMLC?

18 A It's to work with licensing  
19 matters and represent those noncommercial  
20 stations, whether they're educational,  
21 college-run stations or the non-college  
22 stations, in licensing matters, to represent

1 them in licensing matters.

2 Q Now, do the noncommercial  
3 broadcasters represented by the NRBNMLC differ  
4 from commercial broadcasters?

5 A Oh, absolutely. The main  
6 difference is that we do not generate revenue  
7 from advertisers. Our revenue is  
8 community-supported, whether through possibly  
9 underwriting, programmers, but a large portion  
10 of most noncommercial stations, a large  
11 portion of the revenue, comes from individuals  
12 within their community supporting that  
13 station.

14 Q Are there also FCC requirements  
15 concerning the type of programming that  
16 noncommercial broadcasters are required to  
17 air?

18 A We are required to air programming  
19 that is religious in nature or educational in  
20 nature. So there are differences in what we  
21 are required. The answer to that would be  
22 yes.

1 Q Now, do broadcasters represented  
2 by the NRBNMLC differ from stations affiliated  
3 with National Public Radio?

4 A Yes. The difference there is that  
5 we do not receive any government subsidy for  
6 our broadcast facilities.

7 Q Is streaming the primary  
8 operational focus of the stations who are  
9 represented by the NRBNMLC?

10 A No. The primary focus for all of  
11 the stations, I would say, is the signal that  
12 the on-air signal represents. We focus on  
13 that as the bread and butter of our operation.  
14 Without that signal, streaming operation  
15 wouldn't be useful to us, no.

16 Q How is the NRBNMLC governed?

17 A We have -- we set up a board about  
18 three years ago. And, again, we are an arm of  
19 the NRB's Licensing Committee. We are an arm  
20 of that. But we do have a board of about ten  
21 members. I already mentioned Harv. He is the  
22 chairman of our board. I am a board member.

1 take out when we're at events to hand out to  
2 people.

3 Our goal would be that everybody  
4 at an event coming or going would have one of  
5 these in their hand. We send these out to  
6 everybody on our mailing list. And it's just  
7 a good way to remind people who we are or to  
8 introduce them to be a listener.

9 Q Now, if you could just sort of  
10 quickly walk us through this programming guide  
11 and just describe what's in it, describe the  
12 programming for the board?

13 A Yeah. Again, the first page is  
14 just contact information and where you can  
15 listen. I'm sorry. The first page is  
16 actually the cover.

17 The second page of the exhibit is  
18 that contact information and where you can  
19 listen.

20 The third page tells you a little  
21 bit more about us. We received an award in  
22 2004 for one of our broadcasts. And it tells

1 you a little bit about that, also tells you  
2 about the music and the news, our Bible  
3 teaching, and the importance of weather.

4 The next page is the start of our  
5 Monday through Friday program listing. This  
6 isn't listing all of the programs that are  
7 featured on our station. These are all of the  
8 longer-form programs. The short form  
9 programs, they come and go. So it's a little  
10 harder to print up a piece that you are going  
11 to use for a year.

12 And so these are just the  
13 longer-form programs that we have had on for  
14 quite a while, just to get the person  
15 introduced to this piece and idea of what they  
16 will hear and when they will hear it.

17 And then on the next page, page 5  
18 of the program guide continues with the Monday  
19 through Friday. It goes on into the Saturday  
20 program listing.

21 Page 6 of the program guide goes  
22 into -- just continues that information, also

1 with page 7. That's more of our weekends.

2 Page 8 is contact information for  
3 our broadcasters, basically a phone number  
4 where you can get in touch with them if you  
5 would like to order a product or find out more.  
6 information about what they were talking  
7 about.

8 Page 9 is the same thing, also  
9 page 10. It's not the last page but page 6  
10 and 7 of the program guide goes more -- gives  
11 you more information about that three-pronged  
12 approach we were talking about: the music,  
13 news, and information.

14 This wasn't a completed copy of  
15 the program guide. You can see there are some  
16 pictures missing and things, but it does give  
17 you the information about who we are and the  
18 three-pronged approach.

19 Some community and staff pictures  
20 are on the next page. Some of the on-air  
21 hosts but also a small picture of the full  
22 staff is on there, some of the events we have

1 participated in.

2 The top left-hand corner of that  
3 page says, "In Gathering" with question marks.  
4 Again, this wasn't a completed thing but In  
5 Gathering, just for your knowledge, is the  
6 time of year where we get on the air and  
7 introduce ourselves to new listeners or  
8 welcome listeners who have been a part of our  
9 ministry for years to continue supporting the  
10 ministry. It's our fund-raising time,  
11 basically, is In Gathering.

12 The last page is actually the  
13 first page of the program guide. And that is  
14 our station manager there, a picture of him,  
15 and just an introduction thanking you for  
16 listening and being a part of the ministry.

17 Q Now, if you could flip back in  
18 this program guide to page 4? I see at the  
19 top the first block there is identified as  
20 "Morning Praise" from 5:00 a.m. to 8:00 a.m.?

21 A Yes.

22 Q Is that your show?

1 A That is the show that I am a part  
2 of each day. I produce to make sure -- we  
3 have an automation system. So it's a live  
4 assist. Programs play, and I come in talking  
5 between the programs and the music and guests  
6 in and out of newscasts and things like that.

7 Q - And, just to give us an idea of  
8 the content that goes into your morning show,  
9 could you describe, say, for example, a half  
10 an hour, a typical half an hour of --

11 A Yeah. 6:00 to 6:30 would be a  
12 good half-hour. It starts off with CNN plus  
13 Impact News. That goes to about five minutes  
14 after the hour, then have the weather monitor  
15 forecast. That gets us then into our first  
16 song at about seven minutes after the hour.

17 We'll play a couple of songs. And  
18 I'll come in in between each song and give the  
19 time and give the weather and let people know  
20 what is happening in the area. Pretty quick  
21 it goes back to the music.

22 At a quarter after, we then take

1 another break. I'll chit-chat with my other  
2 host, who is the news guy. And we'll talk  
3 about -- we both have young kids. We might  
4 talk about what the families are doing or just  
5 give some light information.

6 At that time, I then turn it over  
7 to him. He'll give an update on the news,  
8 what is happening, what are some stories that  
9 he might not have covered the last 15 minutes,  
10 give a weather monitor forecast again. And  
11 then we'll play a short feature.

12 Short feature at this point is a  
13 three-minute daily devotional, taking a  
14 passage of scripture and digging into it a  
15 little deeper. It's called My Utmost For His  
16 Highest. It's an Oswald Chamber devotional  
17 that has been around for years. And there is  
18 a man who has gone through and read all of  
19 those. So we air that at that time.

20 That takes us to about 18 or 19  
21 minutes after the hour. We'll play another  
22 song and maybe two songs if there's time. And

1 that gets us into the half-hour.

2 Actually, we probably get into  
3 that a little later. By the time he's done  
4 with his news, it's probably 19 after. A  
5 2-minute short feature would get us to -- 2,  
6 3-minute -- 22 after. So that gives us time  
7 for one, maybe two more songs.

8 I'll say some things about an  
9 upcoming event. We've had three concerts this  
10 past -- last month, in July. So we'll talk a  
11 little bit about a concert or a promotion that  
12 we're having, how you can be involved, we  
13 would love to see you come out, say "Hi" when  
14 you're there, something to that effect,  
15 something that the station is doing. That  
16 gets us into the news, and we start all over  
17 at 6:30, basically the same format of news,  
18 music, and information.

19 Q And about how many songs per hour  
20 would you estimate are played on the morning  
21 show?

22 A During the morning show, we'll

1 play about six songs. If I'm really tight, I  
2 might get seven in there, but on a daily  
3 basis, I would say six songs is the most we  
4 play in the morning show.

5 Q Okay. Let's talk just a little  
6 bit more now about how CDR supports its  
7 operations. And I believe you stated earlier  
8 that you're not allowed to sell advertising.

9 A That's correct. We're a  
10 noncommercial station. We are  
11 community-supported. We call ourselves a  
12 community-supported media ministry at  
13 Cedarville University.

14 About 50 percent of our support  
15 comes from individual donors. And that's why  
16 In Gathering is so important to us. We have  
17 to keep that 50 percent, let people know that  
18 we need their support to help the ministry  
19 stay strong.

20 So that 50 percent comes in. And  
21 when someone gives -- if someone from Columbus  
22 were to call and say, "I'm giving to the

1 ministry," that money is allocated to the  
 2 Columbus fund. So that is important for us,  
 3 that 50 percent.  
 4 Twenty-five percent of our income  
 5 comes from underwriters, again very  
 6 community-centered. It could be a mom and pop  
 7 bakery in Chillicothe that listens to us  
 8 throughout the day as they work or there is  
 9 some reason why they have connected with the  
 10 ministry. That underwriter than wants to  
 11 support the CDR Radio Network. As a thank  
 12 you, we are able to give them a mention on the  
 13 air one or two times a day.

14 But, again, it's a community-  
 15 supported thing. It doesn't have to be a mom  
 16 and pop bakery. It could be a large  
 17 corporation, but, again, it's a thank you.  
 18 They are supporting us. Again, that's 25  
 19 percent of our budget.

20 The last 25 would be from the  
 21 program producers in the program guide, we  
 22 listed our programs. Many of them support us

1 on a regular basis and send us funds to say  
 2 thank you for airing their program. They're  
 3 basically considered underwriters also.  
 4 They're underwriting the time that they are on  
 5 the broadcast, the broadcast is on, but that's  
 6 another 25 percent.

7 CHIEF JUDGE SLEDGE: I don't  
 8 understand the difference between underwriters  
 9 and the last group.

10 THE WITNESS: A broadcaster. The  
 11 underwriter, Your Honor, is a local community  
 12 corporation or business.

13 CHIEF JUDGE SLEDGE: Who gets a  
 14 commercial?

15 THE WITNESS: It's an underwriting  
 16 spot similar to commercial. We're not allowed  
 17 to sell products. We're not allowed to say,  
 18 "Go down to Harry's Automotive and get 4 tires  
 19 for \$50." We're not allowed to do that.  
 20 We're just allowed to --

21 CHIEF JUDGE SLEDGE: You are  
 22 listening to different noncommercial stations

1 than I listen to.

2 (Laughter.)

3 THE WITNESS: Well, some  
 4 noncommercial stations don't understand the  
 5 rules like they should I guess would be a way  
 6 to put it. We basically state that -- go down  
 7 to our -- we don't say, "Go down to." We say,  
 8 "This automotive store is blessed to have the  
 9 resources to give to CDR Radio Network. And  
 10 we appreciate them. Their phone number is,"  
 11 and then we give the 800 number or "Their Web  
 12 site is."

13 But that's basically all that we  
 14 can do in that underwriting spot, is say who  
 15 they are, that they're supporting the  
 16 ministry, and that "You can contact them" and  
 17 a phone number, give them the contract  
 18 information basically, the phone number or the  
 19 Web site.

20 The broadcast entity is a  
 21 30-minute program basically. And they are  
 22 outside of our listening area, a lot of them,

1 but they are national organizations that we  
 2 have asked to come on the air. And we have  
 3 asked if we could use their content to fill  
 4 our time on the air for that 30 minutes. As  
 5 a thank you for us picking them, they sponsor  
 6 that 30 minutes of time. Not every  
 7 broadcaster does that. Some of them do but  
 8 not all of them.

9 So it is similar to an  
 10 underwriter, but it is a different  
 11 relationship.

12 CHIEF JUDGE SLEDGE: They provide  
 13 the programming?

14 THE WITNESS: They do provide the  
 15 programming. That's correct.

16 CHIEF JUDGE SLEDGE: Thank you.

17 BY MS. ABLIN:

18 Q Mr. Johnson, can you tell us what  
 19 the average size of a listener donation is?

20 A We have two categories that we  
 21 really push during our time of In Gathering.  
 22 The first is what we call a friendship circle.

1 And those -- these two are the backbone of our  
2 financial support.

3 Friendship circle members are  
4 those who sponsor the ministry at \$20 a month,  
5 a total for \$240 a year. So if they wanted to  
6 send us a lump check for \$240, that would make  
7 them a friendship circle member but basically  
8 \$20 a month.

9 The other level would be someone  
10 who supports the ministry at a dollar a day.  
11 So that's roughly \$30 a month. So those 20  
12 and 30-dollar a month levels are a large  
13 portion of our income.

14 Q And how does CDR solicit  
15 donations?

16 A The two major ways that we solicit  
17 donations are through the In Gathering, a time  
18 in the year in October where we set aside  
19 three days to really talk about our need, that  
20 we are a noncommercial station, that we're  
21 community-supported, and that you are  
22 sponsoring your community station when you

1 give to the ministry.

2 So In Gathering in October is very  
3 important for us. We set aside the whole  
4 month to state the need. But it's that -- I  
5 believe it's the 17th, 18th, and 19th of this  
6 year where we have 3 days of very intensive  
7 letting the communities know that we have this  
8 need.

9 In the past, we have taken our  
10 broadcasting off the air. Our broadcast  
11 partners have agreed to that. And we have  
12 pulled all broadcasting and just discussed our  
13 need for that three-day period from 6:00 in  
14 the morning until 6:00 at night. We're in  
15 discussion if we should do that this year or  
16 not, but we have done that in the past.

17 The second time of the year would  
18 be our Finishing Well campaign. It's the  
19 month of June, the end of our fiscal year.  
20 And for that month, we basically say, "This is  
21 our need. If you would like to help us meet  
22 this need, please do contact us. If you can

1 give a special gift, then we have many  
2 friendship circle members who have given their  
3 240." But they'll say, you know, "We know  
4 there's this extra need. We'll give an extra  
5 \$100 maybe" or something. That happens.

6 But that Finishing Well campaign  
7 is a time for people to realize, "Oh, I said  
8 I would give. Now I really do need to give  
9 because their fiscal year is ending."

10 Finishing Well we do not have a  
11 concentrated three-day period. It's just a  
12 time where we send out a letter and let people  
13 know we will have spots, preproduced spots,  
14 that were on 30-second spots that will say the  
15 need or our on-air hosts, who are actually  
16 live and on air, like I do with Morning  
17 praise. We'll talk about it and say we have  
18 a need.

19 This year for the first year we  
20 sent out segmented letters so each community  
21 knew exactly how much they needed. So like  
22 Jackson, Ohio, which is a smaller community,

1 they needed -- I don't remember the numbers,  
2 but it was something like \$5,000. And so we  
3 specified in that letter, "Your community  
4 needs to support the station. And our goal is  
5 \$5,000. If you would like to help us reach  
6 that goal, you can do that." We did a  
7 different letter for Columbus and  
8 Dayton-Springfield so everybody knew what the  
9 need would be.

10 We also send out a newsletter  
11 basically quarterly, sometimes three a year  
12 depending on if our staff has time to produce  
13 it, but basically four times a year, we'll  
14 have a newsletter called Family Line that  
15 would go out and make mention. We send them  
16 out, four letters, outside of Family Line four  
17 letters, a year that would tell a listener  
18 about our financial needs.

19 Q And in terms of programming and  
20 sources of funding, how representative is CDR  
21 of other noncommercial religious stations?

22 A I believe funding-wise, most

1 noncommercial stations run the same way we do.  
2 They're community-supported. They rely  
3 heavily for the community to be a backbone of  
4 their funding.

5 Some stations play less  
6 programming than we do. Some stations may not  
7 request the same amount of funds that we do  
8 for that programming block for certain  
9 programs.

10 So the percentages might be  
11 different. It might be 75 percent community,  
12 25 underwriting. Some noncommercial stations  
13 don't have underwriting. So it might be  
14 different there where it's 75 percent for  
15 community-supported and 25 percent  
16 broadcaster-supported.

17 Each is a little different, but on  
18 the whole, we all rely on that local community  
19 as the backbone of our funding.

20 Q Now I would like to touch on a  
21 couple of other quick areas before we actually  
22 get into CDR's streaming operation.

1 A Okay.

2 Q So I would like to ask you to turn  
3 to paragraph 26 of your statement. It's on  
4 page 9.

5 A Okay.

6 Q You testified a few minutes ago  
7 about CDR's three-pronged approach to  
8 programming. I would like you to take us  
9 through one by one each of those prongs and  
10 tell us about the creative contributions that  
11 CDR makes to its programs, to each type of  
12 programming.

13 A Right.

14 Q So let's start with the teaching  
15 programming. Can you tell us a little bit  
16 about the creative contributions that go into  
17 your teaching programming?

18 A Yeah. We spend a lot of time and  
19 staff. A lot of the programs have been on for  
20 quite some time, but we do spend time as a  
21 staff making decisions about where a program  
22 should go, what is important for the listener

1 at a certain time of the day.

2 We don't want to have the whole  
3 morning of programs that all sound the same.  
4 It's important for us to have a good creative  
5 mix of Bible teaching, like we have to start  
6 off the day, with a creative mix of  
7 family-friendly programming, like Folks in the  
8 Family that comes right after our Bible  
9 teaching program.

10 We also have Family Life Today.  
11 So we're mixing in some family-oriented  
12 information with some good Bible teaching. We  
13 also during the morning time broadcasts.

14 Cedarville University has a daily  
15 chapel. It's different every day. You don't  
16 know what is going to happen. So we have put  
17 that two times during the day: in the morning  
18 and in the evening.

19 So we do realize that it is  
20 important to have a different type of program  
21 on at different times of the day so it just  
22 doesn't all sound the same.

1 Another way that occurs, it's not

2 just by having a Bible teaching program and a  
3 family-oriented program. You can have two  
4 Bible teaching programs back to back.

5 It's been a while now. I would  
6 say in five years, we made a change in our  
7 evening programming. We had a speaker on who  
8 is very in your face. He is an excellent  
9 communicator. But he brings everything down  
10 to a very simple level almost. James McDonald  
11 is his name. Again, he's a very in your face  
12 and a very rough kind of man it sounds like  
13 when he's on the air.

14 You know, we have coupled that on  
15 the back end with a half-hour. That's a  
16 half-hour program. We have another half-hour  
17 program right after that of a more fatherly  
18 Bible teacher. His name is Chip Ingram.

19 It's almost like he's sitting next  
20 to you. And he's preaching, but he just gives  
21 the impression of we're going through this  
22 passage together verse by verse. Let me give

1 Q And what is your basis for saying  
2 that lots of the listeners outside your  
3 listening area have some sort of connection  
4 with the university?

5 A It would come from those who  
6 contact us. We have heard from missionaries  
7 saying, "My daughter is on the basketball  
8 team. I'm so happy you're broadcasting that  
9 game."

10 We hear from alumni, "Thank you  
11 for broadcasting the chapel broadcast. It's  
12 great to know what's going on." They might  
13 just log on once a week or once a month, but  
14 they still want to have that connection with  
15 the university that they were a part of for  
16 four years of their life.

17 CHIEF JUDGE SLEDGE: When you say  
18 "broadcasting," are you referring to  
19 webcasting?

20 THE WITNESS: Yes, sir. Sorry.

21 BY MS. ABLIN:

22 Q Mr. Johnson, do you have any

1 information concerning where your streaming  
2 listening audience is located?

3 A It is difficult for us to keep  
4 track of where they're coming from and where  
5 they're at, but, again, I would say the vast  
6 majority of our listeners are still part of  
7 what would be the footprint of our broadcast  
8 signal, our terrestrial signals.

9 Q And what are you basing on? Do  
10 you have any sort of information that would  
11 lead you to that conclusion?

12 A Just it would be the contact we  
13 have from our listeners. Our mailing list is  
14 a good example, I guess, of where we cover, I  
15 guess the mailing list and our footprint, the  
16 contact we have with listeners.

17 Q Let's talk about your mailing list  
18 for just a minute. How does CDR communicate  
19 with its mailing list, first of all?

20 A We stated earlier we have two  
21 primary pieces. It would just be a basic  
22 letter that we send out about four times a

1 year. The other would be our Family Line  
2 newsletter that we send our three to four  
3 times a year. That would be our main  
4 communication with them.

5 Q And if I could now ask you to turn  
6 to exhibit 3 of your testimony? Could you  
7 please describe for us what this exhibit is?

8 A This is -- it's an older  
9 newsletter, but it's our newsletter from 1998,  
10 I believe, one of the issues from '98. And we  
11 call it Family Line. And it basically gives  
12 information about what has been happening,  
13 maybe some information about who we are, who  
14 we work with, and give you some broadcaster  
15 information. But basically it is a piece to  
16 give more information about the radio network  
17 and the ministry.

18 Q I would like to ask you now to  
19 just sort of briefly walk us through this  
20 newsletter and describe sort of the elements  
21 that go into it.

22 A Yeah. The top of the page is

1 contact information, where you can listen.  
2 Below that is our station manager, Paul  
3 Gathany, basically giving a welcome to the  
4 newsletter, again more information about what  
5 is happening.

6 This is page 2 of the Family Line.  
7 It gives information about an announcement we  
8 made that CDR radio is now broadcasting our  
9 stream on the Web. And so this was our first  
10 announcement that we did have a stream and it  
11 was available to listen to.

12 We have just basic statements from  
13 listeners. On the third page, there is  
14 information about staff members, information  
15 about broadcasters, more information about  
16 what -- how listeners have responded. There  
17 is a statement there from one of the  
18 correctional institutions that we are near, a  
19 statement, quote, that came from that  
20 community.

21 And then on page 4, it gives --  
22 during our 35th anniversary, we produced a



1 on page 10? Actually, if you could turn to  
2 page 11 and take a look at paragraph 30 there?

3 What is the current noncommercial  
4 statutory rate for streaming sound recordings  
5 that you identify in your statement?

6 A It's .02176 cents per listener  
7 song when you add in -- well, that equals  
8 .26112 cents per aggregate tuning hour.

9 Q Are you aware whether that rate is  
10 higher than or lower than or the same as the  
11 statutory rate that applies to commercial  
12 simulcasters?

13 A That is lower than what the  
14 commercial webcasters pay.

15 Q And could you please describe for  
16 us your view on the appropriateness of the fee  
17 level, the statutory fee level, as well as the  
18 statutory rate structure that's reflected in  
19 the statutory rate?

20 A Yeah.

21 CHIEF JUDGE SLEDGE: Please ask  
22 that question again. I didn't understand it.

1 MS. ABLIN: Okay. Yes.

2 BY MS. ABLIN:

3 Q Mr. Johnson, could you just please  
4 describe, as you do in your statement in  
5 paragraphs 29 and 30, sort of your view on the  
6 appropriateness of the fee level and the fee  
7 structure set forth in the statutory rate?

8 A The problem we have with the level  
9 and the structure is that the level starts out  
10 at what appears to be a small amount, but it  
11 actually is a large amount when you do the  
12 math and work it out per listener. It becomes  
13 very expensive for somebody streaming on the  
14 Web per listener as the rate increases -- or  
15 at this rate.

16 As the listenership increases, it  
17 becomes a problem because each time if you  
18 have 100 listeners, you start at over \$2,000.  
19 But if you have 101 listeners, then that rate  
20 increases. And if you have 1,000 listeners,  
21 it even gets larger.

22 We need to somehow budget what we

1 are going to pay for streaming per year. It  
2 becomes very difficult for us to budget unless  
3 we cap our listeners at a certain level. We  
4 don't know where to budget the listening  
5 level.

6 So if it just keeps increasing  
7 with each listener, we have a very difficult  
8 time knowing what we will need to pay per year  
9 for our streaming.

10 Q Now, if you could please take a  
11 look at paragraph 30 of your statement, about  
12 six lines down there, just to clarify the  
13 record, I see here that you have stated, "If  
14 we reached our 2,000 listener capacity on a  
15 consistent basis, we would risk paying over  
16 45,000 in royalties every year.

17 Now, you testified earlier that  
18 it's actually a 1,000 listener capacity,  
19 correct?

20 A That's correct. So, again, that  
21 would be 1,000. We would have to cut the next  
22 number, the 45,000, in half. And also the

1 footnote, footnote number 5, that is incorrect  
2 also. It would be 1,000 listeners. And we  
3 would need to cut the next number in half  
4 also.

5 Q Now, does CDR actually pay for its  
6 streaming under the noncommercial statutory  
7 rate?

8 A We do not.

9 Q Are you aware of any noncommercial  
10 broadcasters that pay under the statutory  
11 rate?

12 A I am not aware of any.

13 Q Under what licenses do you pay for  
14 streaming?

15 A We pay under a special agreement  
16 with the -- there was a special agreement that  
17 noncommercial -- I'm sorry -- NRB Music  
18 Licensing Committee made the agreement with  
19 SoundExchange. And also other noncommercial  
20 stations that aren't affiliated with NPR made  
21 an agreement with SoundExchange.

22 Q And, just so it's clear, are you

1 referring to an agreement that was negotiated  
2 under the Small Webcasters Settlement Act?

3 A That's correct.

4 Q Are the fees that you pay under  
5 that alternative agreement, without getting  
6 into the specifics of the fees here, higher  
7 than or lower than these noncommercial  
8 statutory rates?

9 A They are lower than.

10 Q And can you tell me how the  
11 NRBNMLC in your capacity as a board member on  
12 the NRBNMLC ultimately decided to accept those  
13 rates?

14 A We had options. We had options of  
15 telling everybody to stop streaming. We had  
16 options of paying the higher rate. And  
17 basically with a gun to our head, we were told  
18 you could accept these rates or try the other  
19 two options. And we decided that this was the  
20 best option at that time to go with the rate  
21 that was agreed upon.

22 Q Do you believe that the rates of

1 that alternative agreement represent rates  
2 that a willing buy would pay a willing seller  
3 in a competitive marketplace?

4 A I don't agree with that.

5 Q And is it because you think that  
6 those rates are too high or too low?

7 A I think they are still too high.

8 Q Well, let's talk for a moment  
9 about the NRBNMLC's specific fee proposal.  
10 And if you could just turn to -- you discussed  
11 this in your testimony, I believe, from pages  
12 12 to 17.  
13 lyrical content

14 My first question to you is, what  
15 sort of fee structure is the NRBNMLC  
16 requesting?

17 A We're requesting a flat fee  
18 structure.

19 Q And why are you posing a flat fee  
20 specifically, as opposed to a fee that  
21 increases with listenership as the statutory  
22 rate does?

1 A And one of the reasons is it would  
2 help us with our budgetary concerns. We would  
3 know what the fee would be every year and what  
4 is required of us when it comes to paying that  
5 fee.

6 Q And if I could now direct your  
7 attention to paragraph 33 of this section?  
8 You say there that "As a guiding principle, I  
9 see no reason why digital sound recording  
10 performance royalties should cost any more  
11 than musical work performance royalties in  
12 analogous contexts." Why do you say that?

13 A For this situation, one without  
14 the other is no good. We need them both to be  
15 able to play the song performed by the artist.  
16 So we need to have both for this to work. One  
17 without the other is not helpful.

18 Q And as between which of these  
19 rights do you as a religious broadcaster tend  
20 to place more value on one right over the  
21 other?

22 A I see it's more important that the

1 content of the music -- that's highly  
2 important to us, what the song is saying, the  
3 message of the song. The musical works is  
4 more important to us. The sound recording  
5 would be of lesser value to us.

6 Q And so do you have a view as to  
7 which rate as between the two should be priced  
8 higher or lower than the other or should they  
9 be priced the same?

10 A With that being in mind, I would  
11 say that the sound recording would be lower,  
12 should be lower.

13 Q If you could look at paragraph 34  
14 of your statement, just the next paragraph  
15 there? There you identify another guiding  
16 principle in that you say that you see little  
17 difference between simulcast listeners and  
18 over-the-air listeners.

19 I think later in that paragraph  
20 you say, "On a listener-by-listener basis,  
21 royalties for internet simulcasts should be no  
22 more than rates for over-the-air broadcasts

1 percentage would be. So our 50/50 mix would  
2 make our payment \$150. If a station was  
3 60/40, it would be \$160.

4 Q And then, finally, just a couple  
5 of questions on recordkeeping.

6 JUDGE WISNIEWSKI: Before we get  
7 there --

8 MS. ABLIN: Yes?

9 JUDGE WISNIEWSKI: -- just to  
10 clarify your proposal in my mind, you  
11 mentioned that up to two side channels would  
12 be encompassed in the first fee? The side  
13 channel that you have, for example, at your  
14 radio station, I take it that has different  
15 programming than your simulcast?

16 THE WITNESS: Our side channel has  
17 most of the time the same broadcast as what is  
18 happening on our normal stream. And we use  
19 our side channel for special features, like  
20 sporting events and broadcasting of special  
21 conferences or if a special speaker comes onto  
22 campus that we are not going to broadcast over

1 the -- with our over-the-air signal or our  
2 live stream, that will go on our side channel.

3 That's the way we use our stream.

4 Other stations use that side channel to have  
5 another format. If they have a music format,  
6 they might have a teaching/preaching stream.  
7 If they have a music format that is on more of  
8 a contemporary side, they might have a more  
9 traditional side channel.

10 So each station is different in  
11 how they treat their side channels.

12 JUDGE WISNIEWSKI: Thank you.

13 BY MS. ABLIN:

14 Q And, then, Mr. Johnson, we're  
15 almost through here, just a couple of  
16 questions on recordkeeping. Is it your  
17 understanding that recordkeeping issues are a  
18 part of this proceeding?

19 A No, they are not a part of the  
20 proceeding.

21 Q And could you, then, just very  
22 briefly explain from sort of the

1 20,000-foot-level the NRBNMLC's concerns with  
2 recordkeeping requirements?

3 A Our concern with recordkeeping is  
4 that we as stations don't have the budget to  
5 hire someone to deal with the recordkeeping  
6 that might be needed if it was required for us  
7 to keep track of songs that were played every  
8 day, every hour.

9 Our basic thought is that for our  
10 over-the-air signal, BMI, ASCAP, or SESAC, it  
11 is required that we produce a recordkeeping  
12 for one week per year. And we don't think  
13 that this should be any more than that.

14 Our recordkeeping if we are going  
15 to have any recordkeeping should not be any  
16 more than one week per year listing of an  
17 artist, a song, and possibly what CD it came  
18 from.

19 MS. ABLIN: Thank you, Mr.

20 Johnson. I have no further questions.

21 CHIEF JUDGE SLEDGE: Are there any  
22 further questions of Mr. Johnson?

1 MR. OXENFORD: None for us, Your

2 Honor.

3 MS. BROWN: None for NPR, Your

4 Honor.

5 MR. TAYLOR: None for us, Your

6 Honor.

7 CHIEF JUDGE SLEDGE: Any questions  
8 by SoundExchange?

9 MR. COWIE: Yes, Your Honor.

10 CHIEF JUDGE SLEDGE: All right.

11 We'll recess until 2:00 o'clock and begin that  
12 cross-examination.

13 (Whereupon, a luncheon recess was  
14 taken at 12:22 p.m.)

1 there is a group of stations, we're working  
2 with those listeners who are not at such a  
3 large level, we believe, and some of the other  
4 stations have a possibility. So that's why we  
5 have done it.

6 Q And under your proposed rate, a  
7 talk/news format station would pay \$100 per  
8 year for a single simulcast with 2 associated  
9 side channels. Is that right?

10 A A station that was not  
11 music-intensive playing preaching, teaching,  
12 or talk news would pay \$100. That's correct.

13 Q And so if, for example, there were  
14 a station that broadcast over the air, as you  
15 said, a religious teaching network that was  
16 not music-intensive, that station would pay  
17 \$100 for its simulcasts. Is that right?

18 A For its simulcasts of its  
19 broadcast signal.

20 Q Right. And then if that news/talk  
21 station had 2 side channels that were all  
22 music, music 24 hours a day on each of the

1 simulcast or all the rates in your proposal,  
2 those rates don't change if the number of  
3 listeners increases, the number of listeners  
4 to the stream?

5 A It's a flat fee structure.

6 Q So in paragraph 30 of your  
7 testimony, as it was written, you had  
8 hypothesized what would happen if you had --  
9 you had a little example of what would happen  
10 if you had 2,000 simultaneous listeners under  
11 the current rate.

12 Leaving aside for the moment that  
13 you have corrected that and it's now 1,000 for  
14 the cap, under your rate as proposed, if your  
15 station had 2,000 listeners, simultaneous  
16 listeners, all the time, that would not change  
17 the rate it paid. It would still pay the rate  
18 as if it had ten listeners. Is that right?

19 A The rate would be at \$200 per  
20 stream per 2 side channels. Again, it's a  
21 flat fee. That would be for whatever you  
22 decide your cap would be, if we capped it at

1 side channels, those side channels would be  
2 included in the \$100 payment for the news/talk  
3 simulcasts. Is that right?

4 A The committee believes it would be  
5 important for the integrity of the license  
6 that even though that initial stream, the  
7 stream that is broadcast over the air and over  
8 the internet, is a news/talk format. If they  
9 were to say they had 2 side channels that were  
10 all music, they would be lumped into the \$200  
11 payment.

12 Q But that's not in your rate as  
13 proposed?

14 A That is correct. It is not in the  
15 rate as proposed.

16 Q And the rates we were just  
17 discussing, those rates apply, regardless of  
18 how many listeners the station has to its  
19 stream. Is that right?

20 A Repeat the question. I'm sorry.

21 Q I said, the rates that we have  
22 been discussing, the \$200 for an all-music

1 1,000 or 2,000.

2 Q Or under your rate proposal, there  
3 could be no cap. There's no cap in the rate  
4 proposal, correct?

5 A Each station would have to make  
6 that decision upon themselves if there's not  
7 a cap within our rate proposal.

8 Q So, I mean, if there was a large  
9 -- for example, a large mega church radio  
10 ministry with 100,000 listeners, if it's  
11 noncommercial, that station would still pay  
12 the same \$200 fee to simulcast that. Is that  
13 right?

14 A I'm sorry. I don't understand.

15 Q Under your rate proposal, if a  
16 station has 100,000 listeners and it's a  
17 noncommercial station, it's still going to pay  
18 the same \$200 to simulcast to 100,000 people  
19 as you have said CDR would pay if it were all  
20 music to broadcast to 175?

21 A We currently -- again, you had  
22 just mentioned to broadcast. Are you saying

1 to your testimony that demonstrated that CDR  
2 was representative of other noncommercial  
3 stations on any of those doctrines, did you?

4 A I do not believe I did.

5 Q And you didn't review any  
6 documents regarding other stations' operations  
7 in coming to your opinion that CDR was  
8 representative?

9 A Well, I believe we're  
10 representative because we all basically hold  
11 to the same mission that we want to be  
12 community-supported ministries. And the  
13 stream is an added bonus to that broadcast  
14 ministry.

15 Q And in paragraph 20 of your  
16 testimony, you said that "No one I'm aware of  
17 has come up with a way to receive money from  
18 their internet operations to fully cover the  
19 costs of a religious radio internet  
20 simulcast."

21 Now, you have underwriters for  
22 your over-the-air broadcasts. Is that right?

1 A For over-the-air broadcast signals  
2 do have underwriters.

3 Q And you get donations from people  
4 to support your over-the-air broadcasts. Is  
5 that right?

6 A Like I stated earlier, I think  
7 it's about a 50/25/25 split between those who  
8 sponsor us, 50 being the community sponsors,  
9 local individuals.

10 Q And do you ever approach  
11 underwriters and ask them to underwrite your  
12 streaming operations?

13 A We have found that it is the  
14 internet stream, amount of people listening  
15 doesn't warrant us asking them to do that. We  
16 have not gone to underwriters and asked them  
17 to do that.

18 I am not in the development  
19 office. I do not know a lot of the workings  
20 of the development office, but -- and so I  
21 can't tell you what our conversations have  
22 been when it comes to why we haven't done that

1 or will we do that in the future or what is  
2 the possibility. But when it comes to  
3 underwriting, we don't have a mechanism for  
4 working with the stream and having  
5 underwriters on that stream.

6 Q So if I understood what you just  
7 said, as far as you know, CDR does not ask  
8 underwriters to support its streaming  
9 operations?

10 A Again, I'm not part of the  
11 development office, but to the best of my  
12 knowledge, I don't believe we do that.

13 Q Now, when you made that statement  
14 in paragraph 20 about your awareness of  
15 whether or not other stations were able to  
16 cover their internet operations, prior to  
17 making that statement, you didn't review any  
18 financial documents from any other stations,  
19 did you?

20 A I have not seen any other  
21 financial documents for any other stations.  
22 I have not seen any.

1 Q In paragraph 25, you testify that  
2 noncommercial broadcasters "offer great  
3 promotional value to the record companies."  
4 Do you see that?

5 A I'm sorry. I just got there.

6 Q Oh, sure. So in paragraph 25, you  
7 testify that noncommercial broadcasters "offer  
8 great promotional value to the record  
9 companies." Is that right?

10 A I believe you are correct. I'm  
11 just -- I am looking for where in the  
12 paragraph it is. I'm sorry.

13 Q It's in the first sentence.

14 A Okay. I was looking down further  
15 than that. I'm sorry.

16 Q And in paragraph 34 and earlier  
17 here today, you testified that you thought  
18 that labels got more benefit from the  
19 streaming of their music than the over-the-air  
20 broadcasts of their music because it was  
21 "easier" for listeners to buy CDs while  
22 listening. Is that right?

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
UNITED STATES COPYRIGHT OFFICE  
Washington, D.C.

\_\_\_\_\_  
In the Matter of )  
 )  
 )

Digital Performance Right in Sound )  
Recordings and Ephemeral Recordings )  
\_\_\_\_\_ )

Docket No. 2005-1 CRB DTRA

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF  
ROYALTY LOGIC, INC.

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December 12, 2006

fair payment to Copyright Owners and Performers with a minimum of expense.”<sup>1</sup> The CRB must evaluate the evidence presented, to determine the best means for effectuating the Copyright Act’s intent of ensuring the fair, prompt and efficient collection and distribution of royalties under the Statutory Licenses. SoundExchange and Royalty Logic, Inc. (“RLI”) have two very different approaches for how those policy goals can best be achieved.

5. SoundExchange believes that these objectives could be achieved through the establishment of SoundExchange as a national monopoly for the collection and distribution of statutory royalties and that “willing buyers and willing sellers” would opt for a system with one single monopolistic collective administering the Statutory License.<sup>2</sup> RLI believes that the best way to achieve these objectives, and the system that “willing buyers and willing sellers” would desire (if that test applies here – See, VI, *infra*), is a system where both RLI and SoundExchange co-exist, operating on the same basis and competing for the representation of copyright owners and performers on the basis of administrative cost and service.

6. Under the SoundExchange (national monopoly) approach, all royalties payable under all the Statutory Licenses would be funneled through SoundExchange. Superstar artists such as Metallica, Dr. Dre, Paul Anka, Peter, Paul and Mary – who do not want to affiliate with SoundExchange - would have no choice as to how or from whom their statutory royalties would be collected or distributed. Moreover, they would

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<sup>1</sup> *Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Rule, 67 Fed. Reg. 45239, 45266 (July 8, 2002) (“Webcasters I Librarian’s Decision”)

<sup>2</sup> Although the Copyright Act appears to require the CRB to apply the willing buyer/willing seller standard (Sections 114(f)(2)(B) and 112 (e)(4)) to determine the terms of the license administration, it seems illogical to apply this standard to an issue that is solely of concern among the sellers. See VI, *infra*.

Before the  
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In the Matter of )

ADJUSTMENT OF THE RATES ) Docket No. 96-6 CARP-NCBRA  
FOR NONCOMMERCIAL )  
EDUCATION BROADCASTING )  
COMPULSORY LICENSE )

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**REPORT OF THE PANEL**

**STATEMENT OF THE CASE  
ISSUE**

**DISCUSSION AND FINDINGS  
DETERMINATION AND ASSESSMENT OF COSTS  
CERTIFICATION BY CHAIRPERSON**

**STATEMENT OF THE CASE**

This proceeding was commenced and conducted pursuant to the compulsory arbitration provisions of Section 118 of the Copyright Act, 17 U.S.C. § 118 (1994); Chapter 8 of the Copyright Act, 17 U.S.C. § 801 et seq. (1994 & Supp. II 1996); and the Copyright Arbitration Royalty Panel Rules and Procedures, 37 CFR § 251 et seq. (1997). It is the task of this Copyright Arbitration Royalty Panel ("Panel") to set the statutory compulsory license fees and terms for the Public Broadcasters' use of music<sup>1</sup> in the repertories of the American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), for the five-year period

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<sup>1</sup> More precisely, for the Public Broadcasters' public performance of programming containing published nondramatic musical works contained in the repertories of ASCAP and BMI. 17 U.S.C. § 118(d). As discussed *infra*, "Public Broadcasters" include those "public broadcasting entities" that have not voluntarily settled with ASCAP and BMI on a schedule of license rates and terms and that are represented in this proceeding. 17 U.S.C. § 118(b)(3).



including differences in fair market rates. It is the *magnitude* of the disparity that causes the Panel to further question whether the rates negotiated under prior agreements truly constituted fair market rates. We have concluded they do not.

Recent Commercial Rates as a Benchmark

We previously expressed the view that commercial rates overstate the fair market value of the blanket licenses to Public Broadcasters. That Public Broadcasters have become more "commercialized" in recent years, and appear more similar to commercial broadcasters, is patent to even a casual observer. *See generally ASCAP PFFCL 35-39, 49-80; BMI PFFCL 29-30, 38-40.* Indeed, this convergence may justify a *narrowing* of the vast gap between license fee rates paid by Public Broadcasters and those paid by commercial broadcasters. However, significant differences remain which render the commercial benchmark suspect -- particularly with respect to the manner in which broadcasters raise revenues. Commercial broadcasters generate their revenues through the sale of advertising while Public Broadcasters derive their income through a variety of sources including corporate underwriting, Congressional appropriations, and viewer contributions. *W.R. of Jaffe 15-17; PB Direct Exh. 4; Tr. 1972-73, 2271-73.* Though corporate underwriting may superficially resemble advertising (particularly as underwriting regulations are relaxed), the relevant economics are quite different. In the commercial context, audience share and advertising revenues are directly proportional and also tend to rise as programming costs rise -- increased costs are passed through to the advertiser. *Id.* No comparable mechanism exists for Public Broadcasters. Increased programming costs are not automatically accommodated through market forces. Contributions from government, business, and viewers remain voluntary. *Id.* For these reasons, commercial rates almost certainly overstate fair market value to Public

Broadcasters and, even restricting the revenue analysis to "private revenues", as did ASCAP, does not fully reconcile the disparate economic models.

#### The Panel's Valuation Approach

Having concluded that the Public Broadcasters' suggested benchmark understates fair market value and the ASCAP/BMI general approach overstates fair market value, the Panel adopts an alternate approach which incorporates certain elements of both. That this approach generates rates falling between those we deemed above fair market value (yielded by the ASCAP/BMI approach) and those we deemed below fair market value (yielded by the Public Broadcasters' approach) is confirmatory of its reasonableness.

The methodology that we craft is similar to alternate analyses employed by both ASCAP and Public Broadcasters to demonstrate the reasonableness of their approaches.<sup>35</sup> Our approach is predicated upon the fundamental assumption that the blanket license fee set by the CRT in 1978, for use of the ASCAP repertory by Public Broadcasters, reflects the fair market value of that license as of 1978. This is an eminently reasonable, and essentially uncontroverted, assumption. Indeed, this Panel is arguably bound by the 1978 CRT determination of fair market value of the ASCAP license.<sup>36</sup> We trended that benchmark rate forward to 1996 by adjusting for

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<sup>35</sup> Neither ASCAP, nor Public Broadcasters, *appear* to rely upon this approach as an affirmative fee-generating methodology. *See W.D. of Boyle 9-11; ASCAP PFFCL 115-17; PB Reply PFFCL 65-67 and Appendix A.* But, its use as a confirmatory analysis implies tacit approval of its basic soundness.

<sup>36</sup> Section 802(c) of the Copyright Act provides that CARPs "shall act on the basis" of prior decisions of the CRT. 17 U.S.C. § 802(c). We are aware that in its 1978 decision, the CRT stated: "The CRT does not intend that the adoption of this schedule should preclude active consideration of alternative approaches in a future proceeding." 43 FR 25068 at 25069. However, we do not believe this language was intended to disclaim the Tribunal's factual determination. Rather it appears calculated to encourage future consideration of other

118, the Panel determines that the annual compulsory license fees to be paid from January 1, 1998 through December 31, 2002, by Public Broadcasters for public performance of programming containing published nondramatic musical works contained in the repertories of ASCAP and BMI, should be as follows:

\$3,320,000 to ASCAP, and

\$2,123,000 to BMI.

Said license fees should be paid in accordance with the terms attached hereto as Appendix B.<sup>48</sup>

After reviewing the totality of circumstances, including the 1978 CRT decision, the history of negotiations between the parties, and the manner in which the parties proceeded herein, for the sole purpose of assessing the costs of this proceeding, the Panel finds that ASCAP, BMI, and Public Broadcasters constitute three separate parties. Accordingly, pursuant to 37 CFR § 251.54(a)(1), costs shall be borne equally by the parties -- one-third each by ASCAP, BMI, and Public Broadcasters.

#### CERTIFICATION BY THE CHAIRPERSON

Pursuant to 37 CFR § 251.53(b), on this 22nd day of July, 1998, the Panel Chairperson hereby certifies the Panel's determinations contained herein.

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<sup>48</sup> Excepting the royalty *rates* prescribed under subsection (b), the parties agreed and stipulated to the language of the attached, proposed regulation, 37 CFR § 253.3. However, ASCAP advocated that the regulation be divided into two subparts with the first subpart prescribing terms applicable only to ASCAP, and the second subpart prescribing *identical* terms applicable only to BMI. See joint submissions dated July 8, 1998. The Panel sees no need for separate subparts.

Report by J. Gulin.

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Lewis Hall Griffith,  
Chairperson

---

Jeffrey S. Gulin,  
Panelist

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Edward Dreyfus,  
Panelist

**CERTIFICATE OF SERVICE**

I hereby certify that one copy of the Supplemental Joint Appendix was served on August 7, 2008 via first-class mail or hand delivery, on the following:

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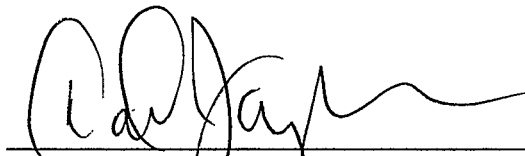
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WRITER'S DIRECT LINE

August 7, 2008

Mark Langer  
Clerk of the Court  
U.S. Court of Appeals for the D.C. Circuit  
333 Constitution Avenue, N.W.  
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Washington, DC 20001

Re: No. 07-1123

Dear Mr. Langer:

Pursuant to Local Rule 30(e), we hereby request to supplement the Joint Appendix in the above-referenced consolidated appeal and, for reasons set forth below, are enclosing herewith a Supplemental Joint Appendix.

The Supplemental Joint Appendix is warranted because after filing the original Joint Appendix, we discovered that (1) three hearing transcripts cited in the parties' originally filed appeal briefs and included in the original Joint Appendix were incorrectly paginated and (2) two sources cited in the parties' originally filed briefs had been inadvertently omitted from the original Joint Appendix. Set forth below is a table listing the materials included in the Supplemental Joint Appendix, along with cross-referenced pages to the original Joint Appendix in the case of the three corrected transcripts included in the supplemental submission.

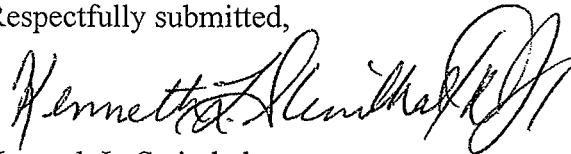
Designations	Joint Appendix Cite	Supplemental Joint Appendix Cite
Volume 5 of Transcript, pp. 281-83, 291, 303-04, 316-17 (testimony of Brynjolfsson, 5/8/06) (CRB-372)	JA 362-68	JA 3282-87
Volume 28 of Transcript, pp. 28-30, 174-80	JA 421-24	JA 3288-92

Mark Langler  
August 7, 2008  
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(testimony of Halyburton, 7/26/06) (CRB-437)		
Volume 31 of Transcript, pp. 15-16, 29, 33-42, 70-71, 117-19, 151-52, 162-63, 207-08 (testimony of Johnson, 8/1/06) (CRB-444)	JA 430-41	JA 3293-3307
Proposed Findings of Fact and Conclusions of Law of Royalty Logic, Inc. p. 2 (CRB-591)	previously omitted	JA 3308-09
1998 CARP Report, In re Adjustments of the Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 1996-6 CARP NCBRA, pp. 24-25, 39-40 (July 22, 1998)	previously omitted	JA 3310-14

If you have any questions pertaining to this Supplemental Joint Appendix, please contact my colleague, David Taylor at (202) 682-7094.

Respectfully submitted,



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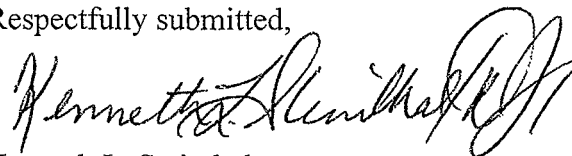
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Respectfully submitted,



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